BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DOUGLAS A. MARTIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,036,685
KANSAS LUMPER SERVICE INC.	)	
Respondent	)	
AND	)	
	)	
COMMERCE & INDUSTRY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 1, 2008 preliminary hearing Order of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was awarded medical treatment and temporary total disability compensation (TTD).

Claimant appeared by his attorney, Mitchell W. Rice of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Douglas A. Martin taken January 1, 2008; the deposition of Al O'Gara taken April 28, 2008; the transcript of the Preliminary Hearing held May 1, 2008, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant suffer an accidental injury on August 25, 2007? Respondent acknowledged at the preliminary hearing that if claimant proved the accident, then it is stipulated that said accident would have arisen out of and in the course of his employment with respondent.[1]

[1] P.H. Trans. at 5.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked as a lumper for respondent for the last 2½ years. A lumper unloads products from a truck, which are then redistributed to other trucks and delivered to grocery stores. Respondent had a contract with Kroger Industries to perform lumper duties at its Dillon's warehouse. On Saturday, August 25, 2007, claimant was assigned to unload a beef truck. This required claimant pick up boxes weighing up to 94 pounds. This particular truck was described as a "beef on the floor" truck.[2] This meant the boxes were on the floor of the truck and had to be moved to pallets. While unloading this truck, claimant felt a little pressure in his low back. Claimant finished his work that day and went home for the night. The next morning, Sunday, August 26, claimant had more pain in his back. When he arrived at work, he was assigned to unload a strawberry truck. This job paid the most money, but was the most physically difficult job. Claimant talked to his weekend supervisor, Al O'Gara, and requested a different load. Words were exchanged between claimant and Al, and claimant was sent home. Claimant testified that he told Al the problem was his back and it was from the day before. Al denies any conversation about a work-related injury to claimant's back on that day.

The next day, Monday, August 27, Al spoke to Matt Sloan, respondent's general manager and claimant's supervisor during the week. While Al testified that claimant made no mention of a back injury, when Al spoke to Matt on Monday, Matt was made aware that he (Matt) had a disciplinary matter to contend with and also "an injury to take care of."[3]

Respondent contends that claimant did not suffer the accident as described, as claimant had suffered from back pain for over a year. Claimant had been seeking chiropractic treatment with Terry L. Webb, D.C., for some time before the alleged injury. Claimant agreed he had sought periodic chiropractic treatment, but also alleged an aggravation on August 25, 2007. The chiropractic records of Dr. Webb do indicate ongoing treatment for claimant, including his low back. An entry dated August 15, 2007, indicates problems over the past 6 days with a gradual onset. The note of that date states "[b]ending lifting @ work comes & goes". A follow-up note of August 22, 2007, states "[b]etter today".[4]

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[2] *Id*. at 9.

[3] *Id*. at 40-41.

[4] *Id*., Cl. Ex. 1.

After meeting with Matt, claimant was referred for medical treatment with Geri K. Hart, M.D., of Medical Center, P.A. The August 31, 2007 medical note indicates claimant was unloading beef boxes weighing up to 94 pounds, without immediate pain. However, claimant later experienced significant mid back pain. Additionally, claimant's legs felt funny. Claimant was also referred to John G. Fan, M.D., of the Hutchinson Clinic, P.A. The history provided Dr. Fan was consistent with the history provided Dr. Hart.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]
>
> An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[8]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[9]

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[5] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2007 Supp. 44-501(a).

[8] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 1, 147 P. 3d 1091, *rev. denied* 281 Kan. ___ (2006).

[9] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.[10]

Respondent denies claimant suffered the injury described. Respondent contends claimant's problems are preexisting, as claimant was seeking ongoing chiropractic care for his back pain for some time before the alleged injury of August 25, 2007. However, in workers compensation litigation, it is not necessary that an injury be caused by a worker's labors, merely that it be aggravated or accelerated by his or her labors. Here, claimant was unloading boxes which weighed up to 94 pounds. It was during this time that claimant experienced a feeling of pressure in his back.

While Al testified that claimant failed to mention the alleged accident on Sunday, August 26, 2007, the day that claimant was sent home, when Al spoke to Matt on Monday, Matt was made aware that an injury existed that he (Matt) was going to have to deal with. The testimony of Al and Matt conflicts with regard to what each knew on Monday.

Additionally, claimant mentioned the injury to a co-worker, Eddie Brawner, on the date of accident. This is the same co-worker claimant was to switch trucks with the morning claimant was sent home after his confrontation with Al. Eddie did not testify to refute claimant's testimony.

Claimant's testimony is credible. The only person to whom claimant spoke on the date of accident, an employee of respondent, was not called to testify in this matter. Additionally, Matt, respondent's general manager and claimant's weekday supervisor, was told on Monday, two days after the alleged accident, that he (Matt) had an injury to deal with. This information apparently came from Al, claimant's weekend supervisor, the person who denied being told of an injury.

Finally, the medical evidence in this record supports claimant's alleged method of injury. While claimant was receiving ongoing chiropractic care before the alleged injury, the chiropractic records from 10 days before the injury discuss problems claimant was having with the lifting at work.

This Board Member finds that claimant did suffer the injuries described from August 25, 2007, while working for respondent. Therefore, an award of benefits by the ALJ should be affirmed.

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[10] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving the incident described on August 25, 2007, while claimant was unloading a truck for respondent did actually occur. The Order of the ALJ granting claimant ongoing medical treatment and TTD should, therefore, be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated May 1, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2008.

HONORABLE GARY M. KORTE

c: Mitchell W. Rice, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[11] K.S.A. 44-534a.